No. 3895

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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KATE I. D'ALERIA,

*Plaintiff in Error,*

vs.

CHARLES SHIREY and JENNIE SHIREY (his wife),

*Defendants in Error.*

## PETITION OF PLAINTIFF IN ERROR FOR A REHEARING BY THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT,

After Decision by Said Court on Writ of Error From the District Court of the United States for the Northern District of California.

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*To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:*

The plaintiff in error in the above entitled cause hereby petitions this Court for a rehearing of said cause after decision rendered by said Court on writ of error from the District Court of the United States

for the Northern District of California, on the following grounds, to-wit:

1. That said decision, as appears from the Transcript of Record on file herein, is based upon an erroneous view by the Court as to what are the facts;

2. That the law in said decision applied to what is therein stated as facts, is in absolute and direct conflict with the law as laid down by the Supreme Court, and by the District Court of Appeal, in the State of California, in which said State said cause of action arose;

3. That said opinion, if permitted to stand, will result in great injustice to the plaintiff in error, as it will make her liable for acts of her employee for which, under the law of the State of California, she is not liable;

and in support of said petition said plaintiff in error respectfully represents and shows to this Honorable Court as follows:

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FIRST: AS TO THE FACTS IN THE CASE.

The only testimony introduced at the trial of this action, which in any way whatever shows, or tends to show, the relationship between this plaintiff in error and Armand d'Aleria, one of the defendants in the above entitled cause, or to in any way connect her with the accident and injuries complained of by the defendants in error, is that of the plaintiff in error herself, that of the said Armand d'Aleria and that of one Genevieve Johnson, is as follows:

**Testimony of Plaintiff in Error on Her Own Behalf.**

Direct Examination.

I am the person sued in this case as Kate Nixon. Since the commencement of this action I and Mr. d'Aleria, who is the same person sued herein as Harold A. Adrian, were married. We are not living together now as man and wife, and a suit is pending against him by me for divorce. I was the owner of the Locomobile touring car which collided with plaintiff's Studebaker, but at the time of that accident I was not in the car, and it was not being used by anyone under my instructions or authority.

Mr. MILLER: Q. Harold Adrian was driving the car at the time of the accident, was he not?

Mr. CAVITT: I object to that on the ground that it is immaterial, irrelevant and incompetent, and calls for a conclusion of this witness.

The COURT: You have proved it, why should you object to it?

Mr. CAVITT: I have proved it.

Mr. MILLER: All right. I will take your proof then.

Witness (continuing): Shortly prior to this accident I had asked Harold Adrian to take this Locomobile automobile from the Powell Street entrance of the St. Francis Hotel, which hotel is located on Powell Street between Post and Geary, to the Class A Garage at 737 or 735 Post Street. Adrian was not my chauffeur. We had been out to call on some friends on Palm Avenue, and immediately prior to my giving to him the instructions above we drove back to the St. Francis Hotel, getting there about eleven or a quarter past. When I got out of the car I requested Adrian to take it up to the garage right away and leave it there. Adrian was a musician,—an organist.

Cross-Examination.

I was living at Reno, but at the time of this accident was living at the St. Francis Hotel, and Mr. d'Aleria was also living there. I think I had been there about a week. Mr. Adrian drove the car that night and once or twice before. I think he drove the car once or twice while we were in Reno. He did not drive it from Reno to Los Angeles or from Los Angeles to San Francisco. He had only driven the car once or twice before the accident. He got the car from the garage with my permission two or three times. I do not know exactly. When the car was first taken to the Class A Garage I think the boy who was driving for me took it there. His name, I believe, was Clarence. He had been driving the car two or three months, I think. Mr. Adrian was in my employ in Reno as a musician. He may have driven the car once or twice in Reno. I do not say definitely he drove the car only four times. I say only a few times. I do not think more than half a dozen times. I do not believe more than half a dozen times altogether during the three months he was in my employ as a musician. He did not drive the car after the accident. About the first time he drove my car in Reno I think was the latter part of March or the fore part of April. The night of the accident Mr. Adrian and myself had been out to Arthur Reese's on Palm Avenue in the Richmond District, and got back to the St. Francis about eleven or half past eleven. The car had been kept by me at the Class A Garage a week or two, something like that, I do not remember exactly. I had been in San Francisco about two weeks. That is the only garage in which the car was kept.

Redirect Examination.

Mr. Reese was a music publisher here in San Francisco, and had a place down on Market

Street which I do not think was kept open at night.

Pages 38 to 42, inclusive, of Transcript of Record.

**Testimony of Harold A. Adrian on Behalf of Plaintiff in Error.**

Direct Examination.

My name is Harold A. Adrian, age 22, living at 5226½ Sunset Boulevard, and am a musician. I am one of the defendants in this case, and know my co-defendant sued herein as Kate Nixon and Mrs. George Nixon. On the 19th and 20th days of April, 1919, I was living at the St. Francis Hotel in San Francisco, which was on the west side of Powell Street between Geary and Post Streets. Mrs. Nixon was living at the St. Francis Hotel on those dates. About 12:30 A. M. on Sunday, April 20th, 1919, I was driving and was in charge of a Locomobile owned by Mrs. Nixon at or near the intersection of Golden Gate Avenue and Gough Street in the City and County of San Francisco, State of California. The defendant Mrs. Nixon was not at that time with me in that automobile. She had been with me in that automobile that evening when I was driving and operating same and she left the automobile about twenty minutes before the accident, which occurred at the intersection of Golden Gate Avenue and Gough Street. I dropped her at the St. Francis Hotel. This automobile was kept at the Post Street Garage sometimes, and at other places. I do not know the exact location of that garage. I was instructed to take the car to the garage, but first told her I was going down to Market Street to see a music publisher down there by the name of Reese, and then I was going to take the car to the garage. I did not go directly to the garage, but did so after I had finished my business. I went to Market Street to the Pantages The-

atre Building, and then to Turk Street on the way to Golden Gate Avenue for a detour, a little ride. There I picked up Harry Hume, who wanted me to drive him to the Fairmont, and I was going to take him there when the accident happened. About the hour of 12:30 A. M. on Sunday, April 20th, 1919, a collision occurred on the intersection of Golden Gate Avenue with Gough Street, between said Locomobile and a Studebaker automobile being driven or operated by the plaintiff Charles Shirey. At the time of such collision, I was driving said Locomobile automobile. There was with me in it Harry Hume and another party unknown to me by name. I was driving the automobile for the purpose of seeing a Mr. Reese, at the Pantages Theatre, about the formation of a music publishing company, which business was my individual business. I never at any time was in the employ of Mrs. Nixon as her chauffeur, but was in her employ as a concert organist.

Pages 47 to 51, inclusive, of Transcript of Record.

**Testimony of Genevieve Johnson on Behalf of Defendants in Error.**

Direct Examination.

In the month of April, 1919, I was employed in the Class A Garage as a bookkeeper, and in charge of the office, and had been there since February. I knew Harold A. Adrian. He brought a car into the garage, but I do not remember the date. He brought the car into the garage and took the car out of the garage—came after it several times again and took it out.

Pages 51, 52 and 53 of Transcript of Record.

Cross-Examination.

I do not remember the dates because I have not looked them up. (Page 53 of Transcript.) I

know he came there at least three or four times. (Page 54 of Transcript.) He brought the car in the garage and came to me in the office and told me to send the bills to Mrs. Nixon at the St. Francis Hotel as usual. (Page 55 of Transcript.) Mrs. Nixon had always had a driver before, and it had been some boy we knew, and this boy we did not know until he came after the car. She had always had a driver before since about 1914. She did not keep the car steadily but kept it there off and on whenever she was in San Francisco. (Page 55 of Transcript.)

The foregoing are facts established by evidence introduced on the trial of this case as to which there is absolutely no conflict of any kind or character; and we respectfully submit that they conclusively show that at the time of the accident in question plaintiff in error was not in the automobile belonging to her, and had no management or control thereover; that it was not being used or operated for her or in connection with any of her business or affairs; that at the time of said accident said automobile was in the sole and exclusive possession, management and control of the said d'Aleria, and was being used and operated by him solely and only for his own personal purposes.

We also further respectfully submit that the foregoing testimony conclusively shows that at the time of the accident in question d'Aleria was not returning the automobile of the plaintiff in error to the garage where he had been directed by her to take it, for the accident occurred, as it will be noted from

that testimony, at Golden Gate Avenue and Gough Street, while the garage in question was at 735 and 737 Post Street, between Jones and Leavenworth Streets. From this it will be seen that the accident in question occurred some six blocks south of Post Street and about seven blocks west of said garage. We respectfully suggest, therefore, that the Court was in error when it stated in its opinion, which is set forth in full in the appendix following this petition, as follows:

> "The evidence sufficiently shows that d'Aleria, although not engaged as a chauffeur by the plaintiff in error, sustained such relation to her that in returning the automobile to the garage he acted as her servant."

It will also be noted that there is no contradiction of any kind or character of the testimony of d'Aleria to the effect that at the time of the accident in question he was using the automobile of plaintiff in error for the purpose of taking a ride with a friend of his by the name of Hume, and was then on his way to the Fairmont Hotel where Mr. Hume resided. It will also be noted by the testimony of d'Aleria, which is in no way disputed, that after he left the St. Francis Hotel with the automobile of plaintiff in error he was using said automobile solely and only for his own personal purposes and not for or in connection with any business or affairs of said plaintiff in error.

That testimony, we respectfully submit, is absolutely uncontradicted, is clear and concise, and was

in no way whatever discredited; and it will be noted on an examination of the Transcript that the plaintiff in this case did not make any attempt of any kind or character to discredit it or to impeach Mr. d'Aleria.

Under such circumstances we respectfully submit that the jury was without any justification whatever in disregarding Mr. d'Aleria's testimony; that their right to accept or reject the testimony of a witness is not an arbitrary one, but one that must be justified by something brought before them in the trial of the case.

Also the same remarks are applicable to the testimony of this plaintiff in error. She was not impeached. No attempt of any kind or character was made to impeach her, or to in any way discredit her testimony, and she stated positively that at the time of this accident her automobile was not being used for her, or for or in connection with any of her business affairs.

The Court in its opinion also states with reference to d'Aleria as follows:

> "He had, as the evidence clearly shows, acted as her agent in going to the garage to get the automobile for her, in driving it for her, and in returning it to the garage after she had used it."

But if your Honors will examine the testimony to which we have hereinbefore referred, it will be seen that this statement is correct only to a limited extent; that d'Aleria was not the chauffeur of plaintiff in error, and that he had not driven her car except

on a few occasions, not more than half a dozen times altogether; that plaintiff in error had had a chauffeur who had driven her car and looked after it up to the two weeks she was in San Francisco in April, 1919.

The Court further states in its opinion with reference to d'Aleria:

> "He had no means with which to respond in damages, and it is obvious that both he and she had every incentive to relieve her from responsibility from the results of the accident."

Here again, we believe the Court is in error, and that the evidence above quoted does not justify that conclusion; and in support of this view we would respectfully call the attention of the Court to the fact that according to the evidence to which we have hereinbefore referred, plaintiff in error and d'Aleria were not living together as husband and wife; that plaintiff in error had sued him for a divorce, which divorce was then pending. Under such circumstances, it would seem that there would be greater justification for believing that d'Aleria would try to injure plaintiff in error rather than to help her.

And we might also add in this regard, that even though it be a fact that d'Aleria is personally irresponsible financially, that cannot constitute any good reason for shifting any legal liability that exists against him arising out of this accident to the shoulders of the plaintiff in error.

The Court further states in its opinion when referring to the *prima facie* presumption of liability against the plaintiff in error because of her ownership of the automobile in question, as follows:

> "The jury was not bound to believe all the testimony that was offered on behalf of plaintiff in error to overcome that presumption."

With relation to this, we would respectfully suggest that inasmuch as the only testimony in this regard was that of plaintiff in error and that of d'Aleria; that their testimony is without any conflict whatever and is in no way whatever discredited, and they were not impeached or attempted to be impeached by the plaintiff in this action, the jury was not justified in arbitrarily rejecting it.

The Court also further states in its opinion as follows:

> "As to the instructions under which the automobile was placed in charge of the driver, the testimony of the two parties who alone knew the facts differs."

Here again, we respectfully suggest that the Court is in error. The plaintiff in error says she told d'Aleria to take the car to the garage. This is not disputed by d'Aleria. He admits that she so told him, but he stated to her that he would first go down to see a man named Reese on Market Street.

The Court again states in its opinion:

> "What was done with the automobile during the ensuing twenty minutes, the driver alone

> knew. The jury were not bound to believe that he picked up a friend en route or that if he did he intended to go elsewhere than to the garage. There was no corroboration of the driver's testimony by the person who he said was with him at the time of the accident, and there was nothing in the record to corroborate the driver's evidence that such a person was with him at that time. The jury may have believed that the errand of d'Aleria to the music store on Market Street was an errand on behalf of the plaintiff in error. She did not testify that it was not."

With relation to this, we would respectfully suggest that inasmuch as the testimony of d'Aleria as to his actions after he left the St. Francis Hotel is without any conflict whatever, and is in no way discredited; and inasmuch as no attempt of any kind or character was made to impeach that testimony, it would hardly seem that there was any justification for the jury to disbelieve or reject it. While it is true there is no corroboration of the driver's statement, it is also true that it stands as the only evidence of what he did.

And as to the suggestion that the jury may have believed d'Aleria went to the music store on Market Street for the plaintiff in error, we would respectfully suggest that if they did so believe, their belief was absolutely without any justification of any kind or character, for plaintiff in error testified that her only conversation with d'Aleria when he left the hotel was that she told him to take the automobile to the garage, while his testimony is that he went to Market Street to the Pantages Theatre Building to

see Mr. Reese, a music publisher, on his own individual business.

Under such circumstances, we would respectfully submit that while the plaintiff in error did not in so many words state that d'Aleria did not visit Mr. Reese on her business, what she did state was in such direct conflict with that idea that her testimony is equivalent to an absolute statement that he did not go to visit Mr. Reese on her business.

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SECOND: AS TO THE LAW OF THE CASE.

While it is true, as stated in the opinion of the Court, that:

> "*Prima facie* the plaintiff in error was liable for the negligent act of d'Aleria, for the collision occurred from the negligent driving of an automobile belonging to the plaintiff in error and driven by her servant",

it is equally true that that presumption has not, and should not have any weight whatever against the positive uncontradicted testimony of the plaintiff in error and that of d'Aleria (neither of whom was impeached or attempted to be impeached) that at the time of the accident complained of d'Aleria was not in fact acting for the plaintiff in error or for or in connection with any of her business or affairs, but was acting solely and only for his own personal purposes. That in this view of the matter we are correct, we submit is conclusively established by the following cases decided by the District Court of

Appeal of this State, the principles of law stated in which have in no way been modified or changed, and constitute the law of the State of California, to-wit:

*Brown v. Chevrolet,* 39 Cal. App. 738:

This was an action for damages for personal injuries alleged to have been caused by the negligence of one West in driving an automobile belonging to the Chevrolet Motor Company. Plaintiff called the president of the company as a witness on the trial of the case and proved by him that the automobile in question was the property of the company and was being used by West with the company's permission but not on any business or affairs of said company. The court in passing upon this case used the following language:

"Under the recent case of McWhirter v. Fuller, 35 Cal. App. 288 (170 Pac. 417), and many authorities in other jurisdictions, proof of ownership of the automobile, and its use at the time of the accident, under the permission of such owner, established a prima facie case of responsibility for the resulting injuries as against such owner. Appellant insists that, having established a prima facie case, any evidence in conflict therewith was a part of the defense; and that it was the province of the jury to weigh such conflicting evidence and to determine therefrom the ultimate liability of the defendant. The evident answer to this contention is, that the fact which plaintiff sought to prove by the manager of the defendant company was the agency of the driver of the automobile at the time of the accident. Having elicited on direct examination information sufficient to establish a prima facie case of such agency, plaintiff could not properly object to further evidence on the same subject on cross-examination, which would overcome the presumption arising from the

proof of the prima facie case. Any facts as to the nature of the agency were proper subjects of inquiry upon cross-examination, or by the court during the direct examination.

In a somewhat similar case, the court of appeals of New York has recently said: "The presumption growing out of a prima facie case, however, remains only so long as there is no substantial evidence to the contrary. When that is offered the presumption disappears, and, unless met by further proof, there is nothing to justify a finding based solely upon it. (Carroll v. Knickerbocker Ice Co., 218 N. Y. 435, (Ann. Cas. 1918B, 540, 113 N. E. 507.).) Here the presumption arising from the fact of ownership was entirely destroyed by the other evidence. (Potts v. Pardee, 220 N. Y. 431, (116 N. E. 78).)

*Maupin v. Solomon, et al.,* 41 Cal. App. 323:

This was an action to recover damages for the destruction of an automobile belonging to the plaintiff as the result of a collision alleged to have been caused by the negligence of the defendants. At the time of the collision, the defendant Solomon was in the employ of the defendant M. A. Gunst Company, and to facilitate the discharge of his duties was furnished by his employer with an automobile for use in the course of such employment. For his personal recreation he took two friends for a ride, and while so using the automobile in question the accident complained of happened. It was not denied that at the time of the accident, the automobile in question was being used by Solomon for his own personal purposes, or that the accident was the result of his negligence, but it was contended by the plaintiff that when he proved that the automobile belonged to the appellant, and was being operated by its employe at the time of the collision, a presumption arose that

the employe was acting within the scope of his employment, and that such presumption remained in the case in spite of clear and positive uncontradicted evidence that Solomon was not so acting, and created a substantial conflict in the evidence, and that as a result the action of the trial court in denying a new trial must stand on appeal. The court in passing on this question used the following language:

"It is not denied, as testified to by the witnesses introduced by appellant, and corroborated by the surrounding circumstances, that at the time of the accident Solomon was engaged in a pursuit wholly his own, and that such use of the automobile was without the consent of and against the instructions of the appellant. Nor is it disputed that the accident was the result of the negligence of Solomon. But plaintiff's contention in support of the judgment is that when he proved that the automobile belonged to the appellant and was being operated by its employee at the time of the collision, a presumption arose that the employee was acting within the scope of his employment, and that such presumption remained in the case in spite of the clear, positive, and uncontradicted evidence that Solomon was not so acting, and created a substantial conflict in the evidence, with the result that the action of the court in denying a motion for a new trial must be sustained upon appeal.

With this position we cannot agree. The inference relied upon by respondent cannot be indulged under the circumstances of this case. It must yield to the direct and unequivocal evidence rebutting such inference. "Presumptions", such as the one relied on here, "are allowed to stand not against the facts they represent but in lieu of proof of facts, and when the fact is proven contrary to the presumption, no conflict arises, but the presumption is simply

overcome and dispelled." (Savings & Loan Soc. v. Burnett, 106 Cal. 514, (39 Pac. 922).) The authorities in this state abundantly support this view. (Freese v. Hibernia etc. Soc., 139 Cal. 392, (73 Pac. 172); King v. Hercules Powder Co., 39 Cal. App. 223, (178 Pac. 531); Mullia v. Ye Planary Building Co., 32 Cal. App. 6. (161 Pac. 1008); Mauchle v. Panama Int. Exp. Co., 37 Cal. App. 715, (174 Pac. 400).)

The very recent case of Brown v. Chevrolet Motor Co. of California, 39 Cal. App. 738, (179 Pac. 697), in an essential respect is like this case. There a traveling salesman employed by the defendant borrowed its automobile for a pleasure excursion, and while so using it injured the plaintiff. There, as here, the plaintiff contended that he had made out a prima facie case when he had shown that the automobile belonged to the defendant, and that it was the province of the jury to weigh any evidence in conflict therewith; but the court held that a nonsuit had been properly granted, and, quoting from the case of Matter of Carroll v. Knickerbocker Ice Co., 218 N. Y. 435 (Ann. Cas. 1918B, 540, 113 N. E. 507), said: "The presumption growing out of a prima facie case * * * remains only so long as there is no substantial evidence to the contrary. When that is offered the presumption disappears, and, unless met by further proof, there is nothing to justify a finding based solely on it."

*Martinelli v. Bond, et al.,* 42 Cal. App. 210:

This was an action for damages for personal injuries alleged to have been caused by the negligence of the defendants. The proofs were uncontradicted that at the time of the accident the automobile of the defendant Bond was being operated and used by the defendant Noonan for his own personal purposes. That said automobile

had been furnished to Noonan by Bond, Noonan being employed as the manager of Bond's business, and keeping the automobile on his own premises. Here it was contended that when it was proved that the automobile in question belonged to Bond, and was being used by his employee, a presumption arose against Bond, and that when testimony was introduced on behalf of Bond that at the time of the accident Noonan was using the automobile for his own personal purposes such a conflict arose as would preclude the Appellate Court from interfering with the judgment rendered. In passing upon this question the Court used the following language:

"(1) The test of an owner's liability for the tortious act of his employee, while driving the former's automobile, is the nature of its use at the time of the accident; whether or not it is then being used in the transaction of the owner's business. The very basis of the rule of respondeat superior, as applied to automobile accidents, is that the driver of the machine is acting for the owner and not for himself personally at the time of the accident. As soon as the driver steps aside from the owner's business and enters upon the performance of some independent purpose of his own, he ceases to act as the agent of the owner, and the latter's responsibility for his acts terminates. (2) Appellant cites a large number of cases in which owners of automobiles have been relieved from liability for damages resulting from accidents, by reason of the fact that, at the time of such accident, the automobile was in use for a pleasure ride or other personal purpose of the driver. This rule is so well established that there can hardly be said to be conflict of authority thereon. The citation of the following authorities is sufficient to indicate the basis of the rule and its wide application; Thompson on Negligence,

sec. 526; Berry on Automobiles, 2d ed., secs. 601, 618; Babbitt on the Law Applied to Motor Vehicles, 2d ed., secs. 872, 891; Davids on the Law of Motor Vehicles, sec. 216; Mullia v. Ye Planary Bldg. Co., 32 Cal. App. 6, (161 Pac. 1008); Mauchle v. Panama-Pacific etc. Exp. Co., 37 Cal. App. 715, (174 Pac. 400); Brown v. Chevrolet Motor Co. of Cal., 39 Cal. App. 739, (179 Pac. 697); Maupin v. Solomon, 41 Cal. App. 323, (183 Pac. 198); Power v. Arnold Engineering Co., 142 App. Div. 401, (126 N. Y. Supp. 839); Cunningham v. Castle, 127 App. Div. 580, (111 N. Y. Supp. 1057); Morier v. St. Paul etc. Ry. Co., 31 Minn. 351, (47 Am. Rep. 793, 17 N. W. 952); Gousse v. Lowe, 41 App. 715, (183 Pac. 295.).

(3) Upon principle and authority, neither the ownership of the automobile by appellant, nor the fact that the use and care of the same were intrusted by appellant entirely to the defendant Noonan renders the appellant liable for injuries inflicted by the automobile while in use for a purpose entirely unconnected with the appellant or his business.

(4) Respondent relies upon cases which hold that when an employee is entrusted with an automobile, with permission to use it at his discretion in the business of the employer, under what has been termed a "roving commission," it is not necessary, in order to establish the owner's liability to prove that, at the time the injuries were received, the employee was engaged in performing any particular business of the principal. The authorities so relied upon recognize that, even under that rule, it is still necessary to show that, at the time of the commission of the tort, the employee was acting within the general scope of his employment. (Jessen v. Peterson, Nelson & Co., 18 Cal. App. 349, 354 (123 Pac. 219); Berry on Automobiles, 2d Ed., sec. 626.)

(5) It is further contended by respondent that he made a prima facie case against appellant by proof of the latter's ownership of the automobile, and the fact that the driver, Noonan was his employee at the time of the accident. The presumption arising from such prima facie case remained only so long as there was no substantial evidence to the contrary. When the fact is proven to the contrary without contradiction, no conflict of evidence arises, but the presumption is simply overcome. (Maupin v. Solomon, supra; Brown v. Chevrolet Motor Co. of Cal., supra.) In this case there is no conflict in the evidence as to the fact that at the time of the accident, the automobile was in use by the employee for his personal pleasure. Uncontradicted proof of that fact dispelled the presumption of liability on the part of the owner.

The judgment against the appellant Bond is reversed.

Langdon, P. J., and Brittain, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the Supreme Court on September 11, 1919. (See Maupin v. Solomon, 41 Cal. App. 323, (183 Pac. 198.).)

All the Justices concurred.

The Court in its opinion also states that

"If a servant while about his master's business, makes a deviation of a few blocks for ends of his own, the master is nevertheless liable."

With relation to this we would respectfully call the attention of the Court, in the first place, to the fact that the deviation was not one of only a few blocks but one of some twelve or thirteen blocks, as we have hereinbefore shown; and in the second place

that the law as there stated is in direct conflict with the law as declared in the following cases:

Patterson v. Kates, 152 Fed. 481;
Gousse v. Lowe, 41 Cal. App. 715;
Martinelli v. Bond, 42 Cal. App. 209.

In Patterson v. Kates, 152 Fed. 481, the Court held there was no liability on the part of the owner of an automobile under the following circumstances: The defendant owned an automobile which broke down on the way from Atlantic City to Philadelphia, and which he then left with his driver with instructions to repair it and bring it to Philadelphia. After the driver had reached the Delaware River, and while waiting for a ferry, he consented to take a third person in the machine to a place about a mile back on the road, and while making such trip, through his negligence in running too fast, he came into a collision with a horse and wagon on the highway, by which plaintiffs were injured.

*Gousse v. Lowe,* 41 Cal. App. 715:

Here the Court held, as shown by the syllabus in the case, where the automobile of the owner was being driven by the owner's employee on affairs of his own, as follows:

> "If a servant abandons or departs from the business of his master and engages in some matter suggested solely by his own pleasure or convenience or pursues some object which relates to an end or purpose which may be said to be the servant's individual and exclusive business, and while so engaged commits a tort, the master is not answerable although he is using the mas-

> ter's property, and although the injury could not have been caused without the facilities offered to the servant by reason of his relations to his master."

*Martinelli v. Bond, et al.,* 42 Cal. App. 209:

Here the Court held where the automobile of the owner was being driven by the owner's employee on affairs of his own, as follows:

> "The test of the owner's liability for the tortious act of his employee while driving the former's automobile is the nature of its use at the time of the accident; whether or not it is then being used in the transaction of the owner's business. The very basis of the rule of respondeat superior as applied to automobile accidents is that the driver of a machine is acting for the owner and not for himself personally at the time of the accident. As soon as the driver steps aside from the owner's business and enters upon the performance of some independent purpose of his own, he ceases to act as agent of the owner and the latter's responsibility for his act terminates. * * * Upon principle and authority, neither the ownership of the automobile by appellant nor the fact that the use and care of the same were entrusted by appellant entirely to the defendant Noonan renders the appellant liable for injuries inflicted by the automobile while in use for a purpose entirely unconnected with appellant or his business."

While we are aware of the fact that this Court is not absolutely bound by the decisions of the District Court of Appeal of the State of California, we understand, at the same time, the rule to be that Federal Courts will follow decisions of State Courts made before the cause of action arose, in the absence

of constitutional difficulties. That in this view of the matter we are correct, we believe is conclusively established by the authorities referred to in Section 477B, Volume 3, Foster's Federal Practice.

For instance, in the case of Snare, etc. v. Friedman, 169 Federal 1, an action brought to recover damages for personal injuries, and taken to the United States Circuit Court of Appeals on a Writ of Error, the Court in discussing the effect that should be given by a Federal Court to the law of a State Court uses the following language:

> "In any trial at common law, a Circuit Court of the United States where its jurisdiction is founded on diverse citizenship has to inquire what the law of the State in which its jurisdiction is exercised may be, and it is the law of that State, whether statute or common law, that it is called upon to administer."
>
> (See third paragraph, page 11.)

And we might add that the law as stated in that case was quoted with approval by the Court in the case of Tobey v. Scranton Railway Company, 245 Fed. 365, where the following language is used, as shown by the syllabus in that case:

> "In the absence of uniform recognized decisions by the State Court covering the rights and conduct of persons regarding the matter under consideration, the Federal Court may regard with equal respect the decisions of courts of other States."

In view of what is stated above, we respectfully submit that the plaintiff in this action is entitled to a rehearing of said cause; to a re-examination of the

facts involved therein and of the law applicable thereto for the reasons:

1. That with due deference to the learned Judge who signed the opinion rendered by this Court, we believe said opinion to have been given and made by him under a mistaken idea of the actual facts as they are shown by the Transcript of Record on file herein;

2. That the law as stated in said opinion is not only in conflict with the law as laid down by the Court in Patterson v. Kates, 152 Fed. 481, but also in conflict with the law as established by the District Court of Appeal of the State of California;

3. That said opinion, if permitted to stand, will result in great injustice to the plaintiff in error, as it will make her liable for acts of her employee for which, under the law of the State of California, she is not liable.

Dated, San Francisco,
March 5, 1923.

MILLER, THORNTON & MILLER,
W. I. GILBERT,
*Attorneys for Plaintiff in Error and Petitioner.*

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CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for plaintiff in error and petitioner in the above entitled cause

and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
March 5, 1923.

H. B. M. MILLER,
*Of Counsel for Plaintiff in Error and Petitioner.*

(APPENDIX FOLLOWS.)

# Appendix.

## Appendix

*In the United States Circuit Court of Appeals for the Ninth Circuit.*

No. 3895

Kate I. d'Aleria,
Plaintiff in Error,
vs.
Charles Shirey and Jennie Shirey (his wife),
Defendants in Error.

Before Gilbert and Hunt, Circuit Judges, and Wolverton, District Judge.

Gilbert, Circuit Judge:

### OPINION

The defendants in error obtained a judgment against the plaintiff in error for damages resulting from a collision between an automobile occupied by the former and an automobile belonging to the latter. The plaintiff in error in her automobile together with one, Armand d'Aleria, arrived at 11 o'clock at night at the hotel in San Francisco where they both resided. The plaintiff in error went into the hotel, leaving d'Aleria to take the automobile, which was a large Locomobile touring car, to the garage where it was usually kept. Twenty minutes later, the collision oc-

curred while the automobile was being driven by d'Aleria. The only testimony as to what occurred from the time when he left the hotel until the accident is furnished by him. Before giving his testimony he had married the plaintiff in error. He testified that the plaintiff in error told him to take the automobile to the garage and that he replied that he would first call at a certain music store to see a music publisher. He testified that he did make the call and that thereafter he picked up a friend whom he intended to take to the Fairmont Hotel, and that he was about to do so when the accident occurred. The Court below instructed the jury that if the automobile in possession of the driver was at the time of the accident operated by him for his own purposes and not in the transaction of any of the duties of his employment with the plaintiff in error, the latter could not be legally held responsible for damages, but that if the automobile were driven for the purposes of the owner, she would be liable for the driver's acts and negligence.

The only assignment of error is that the Court below denied the motion of the plaintiff in error for an instructed verdict in her favor. The plaintiff in error relies upon the doctrine that for a negligent act done by a servant, the master is not liable, unless the act was done at a time when the servant was engaged in his master's business. The evidence sufficiently shows that d'Aleria although not engaged as a chauffeur by the plaintiff in error, sustained such relation to her that in returning the

automobile to the garage, he acted as her servant. He had been employed by her as a musician. He had, as the evidence clearly indicates acted as her agent in going to the garage to get the automobile for her, in driving it for her, and in returning it to the garage after she had used it. He had no means with which to respond in damages and it is obvious that both he and she had every incentive to relieve her from responsibility for the results of the accident. Prima facie, the plaintiff in error was liable for the negligent act of d'Aleria, for the collision occurred from the negligent driving of au automobile belonging to the plaintiff in error and driven by her servant The jury was not bound to believe all the testimony that was offered on behalf of the plaintiff in error to overcome that presumption. As to the instructions under which the automobile was placed in charge of the driver the testimony of the two parties who alone knew the facts, differed. What was done with the automobile, during the ensuing twenty minutes, the driver alone knew. The jury were not bound to believe that he picked up a friend en route or that if he did, he intended to go elsewhere than to the garage. There was no corroboration of the driver's testimony by the person who, he said, was with him at the time of the accident, and there is nothing in the record to corroborate the driver's evidence that such a person was with him at that time. The jury may have believed that the errand of d'Aleria to a music store on Market Street was an errand on behalf of the plaintiff in error. She did not testify that it

was not. If a servant, while about his master's business, makes a deviation of a few blocks for ends of his own, the master is nevertheless liable. Ryne v. Liebers Farm Equipment Co., 186 N. W. 358; Clawson v. Pierce-Arrow Motor Car Co., 231 N. Y. 273; Donaghue v. Hayden, 208 Pac. 1007; Ritchie v. Waller, 63 Conn. 155; Fisick v. Lorber, 159 N. Y. S. 722; Gibson v. Dupree, 144 Pac. 1133; White v. Mitchell Lewis Co., 244 Pa. 172; Guthrie v. Holmes, 272 Mo. 215.

The judgment is affirmed.

(Endorsed): Opinion. Filed February 5, 1923, F. D. Monckton, Clerk, By Paul P. O'Brien, Deputy Clerk.